

A. (No. 5)

v.

Eurocontrol

126th Session

Judgment No. 4016

THE ADMINISTRATIVE TRIBUNAL,

Considering the fifth complaint filed by Mr I. A. against the European Organisation for the Safety of Air Navigation (Eurocontrol) on 29 March 2016, Eurocontrol's reply of 16 September, corrected on 22 September, the complainant's rejoinder of 2 November 2016 and Eurocontrol's surrejoinder of 6 February 2017;

Considering Articles II, paragraph 5, and VII of the Statute of the Tribunal;

Having examined the written submissions and decided not to hold oral proceedings, for which neither party has applied;

Considering that the facts of the case may be summed up as follows:

The complainant impugns the decision not to extend his appointment beyond the mandatory retirement age.

The complainant joined Eurocontrol in January 1998 as an air traffic controller at the Maastricht Upper Area Control Centre and held an appointment for an unlimited period. On 24 June 2015 he asked the Director General of Eurocontrol to allow him to remain in service beyond the age of 55, which he would reach in May 2016. At that time, paragraph 1 of Article 53 of the General Conditions of Employment (GCE) Governing Servants at the Eurocontrol Maastricht Centre stated the general rule that servants other than those mentioned in paragraphs 2 and 3 of that Article would be retired automatically on the last day of

the month in which they reached the age of 65. Paragraph 2 of Article 53 relevantly provided that air traffic controllers recruited after 2 May 1990 – which was the complainant’s case – would be retired on the last day of the month in which they reached the age of 55.

On 24 September 2015 the Director of the Maastricht Centre replied that, as the staffing situation in the complainant’s sector did not justify an extension of his service, he would be retiring on 31 May 2016. The Director also stated that Eurocontrol was reviewing its administrative rules and that any modifications of the rules could have an impact on the complainant’s request.

On 23 October the complainant wrote to the Director General reiterating his request. He claimed that the foreseen administrative reform – which, according to him, was expected to take effect on 1 January 2016 – would allow air traffic controllers to continue working beyond the age of 55. On 7 December 2015 the Director General confirmed to the complainant that he would be retiring on 31 May 2016. He added that the complainant could submit a request for extension should the reform be adopted.

On 21 January 2016 the complainant lodged an internal complaint against that decision, requesting to remain in service beyond the age of 55. Having received no reply, on 29 March 2016 he filed his fifth complaint in which he specifies that he is impugning the implied decision to dismiss his internal complaint of 21 January 2016.

The complainant, who retired on 31 May 2016, requests the Tribunal to declare that he must be allowed to continue his professional activities. He also claims costs in the amount of 25,000 euros. Alternatively, in the event that he is obliged to retire before the Tribunal delivers its judgment, he asks the Tribunal to declare that paragraph 2 of Article 53 of the GCE, and all the decisions related to his request of extension, are null and void and that the provisions of paragraph 1 of Article 53 apply to him. He also asks the Tribunal to order his reinstatement, as well as the payment of material damages and arrears of salary and other benefits. In any event, he claims moral damages and costs.

Eurocontrol submits that the complaint is irreceivable because there was no act adversely affecting the complainant's interests. It asserts that the complainant's claim for the Tribunal to declare paragraph 2 of Article 53 of the GCE null and void is irreceivable since "the act complained of is of a general and abstract character". It adds that this claim is in any case time-barred as the complainant failed to appeal this "general measure" in time. Subsidiarily, Eurocontrol argues that the complaint is devoid of merit.

In his rejoinder, the complainant maintains his claims.

Eurocontrol repeats its arguments in its surrejoinder. It states that the complainant was informed on 13 December 2016 that his internal complaint had been dismissed as unfounded, the Director General having decided to follow the recommendation of the Joint Committee for Disputes, which had issued its opinion on 5 October 2016.

CONSIDERATIONS

1. The complainant impugns the implied decision to dismiss his internal complaint of 21 January 2016. He had filed this internal complaint against the Director General's decision of 7 December 2015 to confirm the rejection of his request to continue to work as an air traffic controller beyond 31 May 2016, which was, according to paragraph 2 of Article 53 of the GCE, the date of his foreseen retirement (the last day of the month in which he would reach the age of 55). The stated reason for the denial of the complainant's request was that the staffing situation in his sector did not justify an extension of his service.

2. By the same 7 December 2015 decision the Director General confirmed inter alia that the complainant would be retiring on 31 May 2016. He added that "if the provisions of the Administrative Reform are approved [...] [air traffic controllers] may remain in service, at their request, for a maximum period of one year, renewable once only, provided their physical and mental fitness to perform air traffic control duties is maintained".

3. After the complainant filed his complaint with the Tribunal on 29 March 2016, he was informed by a decision dated 20 April 2016 that he would be retired on 31 May 2016.

In its opinion of 5 October 2016 the Joint Committee for Disputes recommended dismissing the complainant's internal complaint as unfounded, which the Director General did by a letter of 13 December 2016.

The complaint, though initially directed against an implied rejection of an internal complaint, should now be viewed as challenging the express decision taken during the present proceedings, on 13 December 2016 (see, in particular, Judgment 3667, under 1).

4. Eurocontrol claims that the complaint is irreceivable because there was no act adversely affecting the complainant's interests. It also submits that the complainant's claim for the Tribunal to declare paragraph 2 of Article 53 of the GCE null and void is irreceivable since "the act complained of is of a general and abstract character". The defendant adds that this claim is time-barred as the complainant failed to appeal this "general measure" in time.

5. Eurocontrol's objections to receivability are unfounded. The complainant was directly and immediately adversely affected by the Director General's decision that did not allow him to remain in service beyond the age of 55, as he had requested. The legal basis of the Director General's impugned decision that adversely affected the complainant was paragraph 2 of Article 53 of the GCE, which is a provision of general application. "According to th[e] case law, a complainant can impugn a decision only if it directly affects her/him, and cannot impugn a general decision unless and until it is applied in a manner prejudicial to her/him, but she/he is not prevented from challenging the lawfulness of the general decision when impugning the implementing decision which has generated their cause of action." (See Judgment 3291, under 8, and the case law cited therein.)

6. The fundamental ground for complaint is that paragraph 2 of Article 53 of the GCE, which provided at the material time that air traffic controllers recruited after 2 May 1990 would be retired on the last day of the month in which they would reach the age of 55, involved age discrimination in its application. If it did, then potentially paragraph 1 of Article 1b of the GCE, which prohibits age discrimination, might apply.

7. The complaint is unfounded on the merits. Paragraph 2 of Article 53 of the GCE does not violate the general principle of non-discrimination. The Tribunal accepts that air traffic controllers are in a different situation than other servants subject to the GCE (their work situation is also different from that of pilots). The different treatment for this category of servants and, specifically, the lower retirement age, which was 55 at the relevant time, is justified by the specificity of their work and the contested provision is not unreasonable or unjustified, and therefore is not discriminatory. It must be taken into account that: (a) the ordinary activity of air traffic controllers is particularly stressful and mentally demanding, they are also subject to difficult working conditions and to shift work; (b) the Maastricht Upper Area Control Centre operates in a complex air space with a high traffic; and (c) possibly, in addition, a low retirement age enables Eurocontrol to recruit air traffic controllers more readily over time. The question of non-discrimination and that of a proper evaluation of the specific nature of the work in question, and therefore of its exigencies, are linked. In this evaluation, which is scientifically based, Eurocontrol's evaluations should be accepted unless they are shown to be unreliable having regard to current scientific knowledge. In the present case, for the reasons considered above, the evaluations on which the provision in question is based fall within the range of acceptability.

8. The complainant asserts that the administrative reform which amended Article 53 of the GCE and came into force on 1 July 2016 (shortly after the complainant retired) allows air traffic controllers to request to remain in service for one year, renewable only once, provided they are fit to perform their duties. He points out that the reform sets the retirement age applicable to air traffic controllers recruited as of 1 July

2016 at 57 and that Office Notice No. 16/16 explains that an elevation of the retirement age was justified by the development of the technological environment. The complainant refers to the new provisions to support his plea that the previous provisions violated the principle of non-discrimination.

As the Tribunal stated above, paragraph 2 of Article 53 of the GCE was not unlawfully discriminatory and its amendment does not affect this conclusion. The establishment of a “normal” retirement age for a category of officials is a common rule in international organisations and in national laws. The fact that different rules based on the same or on different criteria (e.g. criteria referring to “a case-by-case basis” or mixed criteria) are established, does not undermine the conclusion that a rule that falls within the range of acceptability and reliability is not unlawful.

9. The impugned decision, based on the general provision in force at the material time, namely paragraph 2 of Article 53 of the GCE, refers to the staffing situation as the reason to reject the complainant’s request. The reference to the staffing situation is immaterial to the issue of the violation of the principle of non-discrimination.

10. The Tribunal has consistently held that a decision to retain an official beyond the normal retirement age is an exceptional measure over which the executive head of an international organisation exercises wide discretion. Such a decision is therefore subject to only limited review by the Tribunal, which will interfere only if the decision was taken without authority, if a rule of form or procedure was breached, if it was based on a mistake of fact or of law, if an essential fact was overlooked, if a clearly mistaken conclusion was drawn from the facts, or if there was abuse of authority (see, for example, Judgment 3939, under 3, and the case law cited therein).

11. In light of the foregoing, the complaint must be dismissed.

DECISION

For the above reasons,
The complaint is dismissed.

In witness of this judgment, adopted on 14 May 2018, Mr Giuseppe Barbagallo, President of the Tribunal, Mr Michael F. Moore, Judge, and Sir Hugh A. Rawlins, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered in public in Geneva on 26 June 2018.

GIUSEPPE BARBAGALLO

MICHAEL F. MOORE

HUGH A. RAWLINS

DRAŽEN PETROVIĆ